

# MINISTRY OF HEALTH



Republic of Botswana

## MEMORANDUM OF AGREEMENT

ENTERED INTO BY AND BETWEEN

**THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA**

REPRESENTING

**CENTRAL MEDICAL STORES**

(herein referred to as “the Client”)

**AND**

*(insert name of supplier)*

(Herein referred to as “the Supplier”)

CONTRACT NO. *(insert contract number)*

TENDER NUMBER: *(insert tender number)*

**Supplies Contract for the Procurement of** *(describe the general term for the specific Supplies procured)*

## PREAMBLE

**WHEREAS** Central Medical Stores (hereinafter “the Client”) is mandated to avail medical products at affordable prices to public health facilities;

**AND WHEREAS** the Client requires the supply and delivery of (*describe the general term for the Supplies procured*);

**AND WHEREAS** (*insert name of the Supplier*) (hereinafter “the Supplier”) is a distributor of medical products;

**WHEREFORE** the Supplier having demonstrated its capacity to meet the needs of the Client, through the submission of a quotation of the medical products sought by Client;

**NOW THEREFORE** the Parties agree as follows:

1. **APPOINTMENT**

The Client hereby appoints the Supplier, and the Supplier hereby accepts the appointment to supply and deliver the Supplies set out in the GPO/LoC, subject to and in accordance with the provisions of this Agreement.

2. **DEFINITIONS**

In this Agreement, the following words and expressions shall, except where otherwise stated or inconsistent with the context in which they appear, bear the following meaning and cognate expressions shall bear corresponding meanings:

<b>Agreement</b>	means the present Agreement and its Appendices, annexes or schedules together with all amendments thereto as agreed to between the Parties from time to time;
<b>Appendix(ces)</b>	means any document, approved by the Client and the Supplier, which is, from time to time, incorporated into this Agreement in the form of Appendices, annexures or schedules. These documents may be amended in writing, from time to time, by mutual agreement between the Parties;
<b>Client</b>	means Central Medical Stores as the executing authority, and permitted assign;
<b>Delivery Due Date</b>	means the date that the Supplies ought to arrive at the Client's specified location, as stipulated in the GPO/LOC issued by the Client;
<b>Days</b>	means Mondays to Fridays inclusive in each week, except Saturday and Sunday or public holidays, unless stated otherwise;
<b>Government</b>	means the Government of the Republic of Botswana;
<b>Government Purchase Order (GPO)</b>	means any purchase order issued by the Client to the Supplier under this Agreement;

<b>Letter of Commitment (LoC)</b>	means an official letter issued by the Client to the Supplier indicating willingness to accept Supplies delivered under this agreement;
<b>INCOTERM(S)</b>	means the latest International Commercial Terms published by the International Chamber of Commerce (ICC);
<b>Parties</b>	means the Client and the Supplier, and “Party” shall mean either one of them;
<b>Personnel</b>	means persons hired by the Supplier or the Supplier’s Representatives and assigned to the performance of the rights and obligations of this Agreement, or any part thereof;
<b>Primary packaging</b>	means the outer packaging of Supplies delivered by the Supplier
<b>Supplies</b>	means the goods to be supplied to the Client by the Supplier as described in the GPO/LOC;
<b>Product Replacement Period</b>	means the time period that shall be agreed between the Parties, for the replacement of any rejected or recalled Supplies;
<b>Representative</b>	means an agent of the Supplier;
<b>Signature Date</b>	means the date of signature of this Agreement by the party last to sign;
<b>Supplier</b>	means .....(insert the name of the Supplier) and includes the Supplier’s representatives, successors, and permitted assigns; and
<b>Unit Price(s)</b>	means the total amount of money payable by the Client to the Supplier for each unit of the Supplies ordered and delivered by the Supplier as stipulated in the GPO/LOC.

### 3. INTERPRETATION

- 3.1 Clause headings are for convenience only and shall not be used in the interpretation of this Agreement;
- 3.2 Terms other than those defined in this Agreement shall be given their plain English meaning;
- 3.3 Unless this Agreement clearly indicates the contrary, an expression which denotes:
  - a) a masculine gender includes feminine and neuter gender, and vice versa;
  - b) a person includes a legal person; and

c) singular includes plural and vice versa.

- 3.4 Any reference to a statutory provision or statute, unless the context clearly indicates otherwise, shall be a reference to a statute of the Republic of Botswana, and shall include any subordinate legislation made from time to time under that provision or statute and shall include that provision or statute as amended or re-enacted from time to time;
- 3.5 Expressions or words defined in this Agreement shall bear the same meanings when used in Appendices, annexes or schedules to this Agreement which do not themselves contain their own definitions;
- 3.6 Where any term is defined within the context of any particular clause in this Agreement, the term so defined, unless it is specifically stated in the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that the term has not been defined in the Definitions Clause.

#### 4. SCOPE OF SUPPLIES

- 4.1 The Supplies to be procured from the Supplier, under this Agreement are to meet the quality and quantity specifications in the Product Specifications which is attached here as “(Provide a drop-down list of all CMS products from which the agreed Products can be inserted here)”, as well as the Price Schedule, attached here as “**Appendix A**” (enable the uploading of the Supplier's pricing schedule to be attached as an annexure to this agreement). The Supplies shall further comply with the General Specifications in “**Appendix B**” (Provide a drop-down list of the 4 different General Specifications here to enable the drafter to choose the appropriate document);
- 4.2 The Supplier acknowledges and agrees that the Agreement between the Parties is limited to the once-off procurement of the Supplies described here and Client is not obligated to purchase any other Supplies from the Supplier, which do not form the subject of this Agreement;
- 4.3 No undertaking or any form of statement, promise, representation or obligation shall be deemed to have been made by the Client in respect of the total quantities or values of the Supplies to be ordered by Client other than pursuant to this Agreement and the Supplier acknowledges and agrees that it has not entered into this Agreement on the basis of any such undertaking, statement, promise or representation.

#### 5. RELATIONSHIP BETWEEN THE PARTIES

Nothing contained herein shall be construed as establishing or creating a relationship of master and servant or principal and agent as between the Parties, it being agreed that the position of the Supplier and anyone else performing the Services on behalf of the Supplier under this Agreement is that of an independent contractor.

#### 6. GOVERNING LAW AND LANGUAGE

- 6.1 This Agreement shall be governed and construed in accordance with the laws of the Republic of Botswana, which shall mean the present laws, and any amendments thereto or new laws enacted during the validity of this Agreement;

- 6.2** This Agreement shall be construed and interpreted in English;
- 6.3** All communications, correspondence and reports pertaining to this Agreement shall be in English.

## **7. COMMENCEMENT AND DURATION**

- 7.1** This Agreement shall commence on the Signature Date;
- 7.2** This Agreement shall remain in force until all the obligations of the Parties have been fully executed, unless earlier terminated by agreement of both Parties, or by either Party in accordance with its terms.

## **8. OBLIGATIONS OF THE SUPPLIER**

### **8.1 Supply and Delivery**

The Supplier shall:

- a) acknowledge receipt of the GPO/LOC by appending the signature of the Seller's representative collecting the LoC/GPO in the relevant record book maintained by the Client;
- b) supply and deliver to the Client, the Supplies at a location specified by the Client in the LoC/GPO;
- c) deliver Supplies which meet the Product Specifications as well as Appendices B and C. The Supplies shall comply with official compendia such as British Pharmacopeia, United States Pharmacopeia, European Pharmacopeia and other internationally recognised standards or in-house standards which are accompanied by scientific justification and proof of validation;
- d) deliver Supplies with a minimum of eighty percent (80%) of the total shelf life remaining on their arrival at the Client's premises;
- e) deliver the quantity of the Supplies specified by the Client in the LoC/GPO;
- f) supply and deliver the Supplies on or before the Delivery Due Date indicated in the GPO/LOC issued by the Client;
- g) on delivery, provide an Original Invoice and Delivery Note to the Client. The invoice shall clearly have the correct GPO/LOC number reflected on it.

### **8.2 Packaging and Labelling**

Unless otherwise specified by this Agreement:

- a) the Supplies are required to be properly packed for long term storage in containers suitable to protect the contents against damage through rough handling and for over-storage in transit or whilst in store, and stacked according to the specifications indicated in **Appendix B**;

- b) primary packaging shall give adequate protection against external influence and potential contamination and the primary container's closure system/material shall be tamper proof with a suitable seal;
- c) all containers (including packing cases, boxes, tins drums and wrappings) supplied by the Supplier shall be considered as non-returnable, and their cost having been included in the Unit Price; and
- d) when so directed the Supplier shall mark each Product clearly and indelibly in accordance with the requirements shown in the Appendix B. The marking shall include any serial number or mark allocated to the Product, and if the Product has a limited shelf life, the date of manufacture, expressed as month (letters) and year (two (2) figures).
- e) Where, because of its size or nature, it is not possible to mark the Supplies with the required particulars, labelling shall be made on the package or container in which the Supplies are packed.

### **8.3 Warranties and Guarantees**

The Supplier shall:

- a) maintain all manufacturers' warranties on all Supplies supplied to the Client;
- b) provide a guarantee against defects on the Supplies supplied, for the life of the Product from the date of acceptance of the Supplies by the Client; and
- c) guarantee the workmanship, performance and safe usage of all the Supplies for the life of the Supplies after the date of acceptance by the Client.

### **8.4 Risk and Property in the Supplies**

- a) The risk in the Supplies shall pass to the Client on delivery, upon obtaining a signed proof of delivery from the Supplier's nominated Representative;
- b) Property in the Supplies shall pass to the Client on receipt by the Supplier, of all amounts due;
- c) Until property in the Supplies passes to it, the Client:
  - i. shall hold such Supplies as a fiduciary for the Supplier, in which full title to such Supplies shall remain;
  - ii. shall not pledge or allow any lien, charge, or other interest to arise over the Supplier's Supplies or their documents of title; and
  - iii. subject to **Clause 8.4 (b)** above, may use the Supplier's Supplies in the ordinary course of its business.

## **8.5 Quality and Replacements**

The Supplier shall:

- a) ensure that the quality of the Supplies is in accordance with the best industry quality standards and in accordance with the Product Specifications described in this Agreement and where samples have been provided, the Supplies shall in all respects conform to the sample;
- b) ensure that such Supplies shall not be re-called after delivery due to quality related reasons at any stage before the stated expiry date of the Product(s) in question;
- c) at no charge to the Client, where the Supplies or any portion of them offered or delivered by the Supplier are reasonably rejected by the Client on delivery as not being equal to the quality, standard or specification contracted for, or as being of a quality inferior to that of the samples where samples have been provided to the Supplier, the Supplier shall forthwith at its own expense remove the rejected Supplies and shall within the Replacement Period replace them with a like quantity of Supplies which meet the specified requirements;
- d) in the event the Supplies are rejected after Client has taken delivery thereof, the Supplier shall remove such rejected Supplies within five (5) days of notification of the rejection the Client. In the event that the Supplier fails to remove such rejected Supplies within the stipulated timeframe, the Client shall, at the Supplier's risk, be at liberty to return them back to the Supplier, with and the cost of carriage being recoverable from the Supplier; and replace the rejected Supplies within the time period that shall be agreed between the Parties and communicated to the Supplier in writing.

## **8.6 General**

- a) The Supplier shall provide all expert advice and skills normally required for the class of Services under this Agreement.
- b) The Supplier shall, in all professional matters, act as a faithful advisor to the Client and, in so far as any of its duties are discretionary, act fairly as between the Client and third parties.
- c) The Supplier, its Personnel, employees, Representatives and attached specialists shall at all times abide by the laws and customs of the Republic of Botswana;
- d) Neither the Supplier, its Personnel nor the agents of either shall engage, either directly or indirectly, during the term of this Agreement, in any business or professional activities in the Republic of Botswana which would conflict with the activities assigned to it under this Agreement.

## **9. OBLIGATIONS OF THE CLIENT**

### **9.1 Placing of Orders**

- a) After award, Client shall place an order for the Supplies by issuance of a LoC/GPO, stating the Product Specifications, the quantities and the price per item to be delivered by the Supplier at a specified location, within the agreed lead time;
- b) The issuance of an LoC/GPO initiates the once-off procurement, which shall be fully executed when both Parties have fulfilled their respective contractual obligations, or the Agreement terminates by mutual agreement or obligations.

## **9.2 Date and Place of Delivery**

The Client shall confirm with the Supplier, the date and place where the Supplies are to be delivered in the GPO/LOC.

## **9.3 Payment**

The Client shall effect timeous payment to the Supplier in accordance with the provisions of this Agreement.

## **9.4 General**

- a) The Client shall furnish to the Supplier all pertinent data and information available to it within a reasonable time and shall give such assistance as shall be reasonably required by the Supplier for the carrying out of its duties under this Agreement;
- b) The Client shall in such reasonable time as not to delay or disrupt performance by the Supplier of its Services under this Agreement give its decision on all reports, proposals, recommendations and other matters relating to this Agreement and referred to it by the Supplier.

# **10. ALTERATION OF SPECIFICATIONS/DESCRIPTIONS**

The Client reserves the right to alter the Product Specifications relating to this Agreement, and as from the date specified by it for any such alteration, the Supplies shall be in accordance with the said specifications, so altered. In the event of such alteration involving a change in the cost of, or in the period required for production, a revision of the Unit Price(s) and of the time for delivery shall be made by the Parties to this Agreement in all other respects this Agreement shall remain unaltered.

# **11. PRICE AND TERMS OF PAYMENT**

- 11.1** The Unit Prices of the Supplies shall remain fixed from the Signature Date. The Supplier shall only be entitled to payment for Supplies actually delivered pursuant to a GPO/LoC issued by the Client, in accordance with this Agreement.
- 11.2** It is specifically agreed that the Client shall not be responsible for any costs or expenses incurred by the Supplier pursuant to this Agreement and that the Supplier shall only be entitled to the Unit Price of each Product supplied;



- 11.3** The Supplier shall invoice the Client and the Client shall pay the Supplier in arrears for the Supplies supplied in accordance with this Agreement. Subject to **Clause 8**, payment shall be made within thirty (30) Days of the date of receipt of an invoice from the Supplier;
- 11.4** Payment to the Supplier shall only be made after delivery, and upon approval and acceptance of the Supplies that have satisfied the Product Specifications.
- 11.5** The Unit Price includes all shipping, handling, freight and any other expenses related to the transporting of the Supplies as defined by the latest INCOTERM Delivery Duty Paid (DDP) GABORONE, BOTSWANA.
- 11.6** The Supplier shall be entitled to receive interest on any late payment. Interest on late payments shall accrue at a rate of 1.5 % simple interest per month from the date such payment was due, until and including the date of payment.

## **12. TAXATION**

The Supplier and its sub-contractors shall be obliged to pay all taxes on any moneys paid to them by the Client including, but not limited to, income tax or value added tax, as the case may be, and to that end, the Client shall be entitled to deduct and withhold from any fees due to the Supplier and its sub-contractors any money due as tax in accordance with the laws of the Republic of Botswana presently in force in relation to tax.

## **13. CURRENCY FLUCTUATIONS**

Currency fluctuations in the exchange rates between the Pula and the currencies quoted in the Supplier's quotation shall not affect the prices specified on the said documents, unless the fluctuations are substantial. In this Clause, "substantial" means a currency fluctuation of five percent (5%) above or below that which was prevailing at the time of submitting the quotation. In the event of such occurrence, and provided that there has been no breach of this Agreement by the Supplier, the proportionate increase or decrease, calculated on the date of importation of the Supplies, shall be added or deducted from the price originally quoted.

## **14. LIQUIDATED DAMAGES FOR DELAY**

- 14.1** If the Supplier fails to deliver the Supplies within the Delivery Due Date, inclusive of any Extended Delivery Due Date and such failure is not due to factors attributable in whole or in part to the Client, then the Client shall, without prejudice to its other remedies under this Agreement, be entitled to liquidated damages calculated as follows:

- A)** the Supplier shall be entitled to an Extended Delivery Due Date of up to 5 Days beyond the Due Delivery Date;
- B)** any delays beyond the Extended Delivery Due Date shall attract Liquidated Damages for Delay **in the same currency as quoted by the Supplier** in its quotation;
- C)** The rate of Liquidated Damages for Delay shall be:

0.1% of the total LoC/GPO amount (Unit Price X Total Quantity per Product), for every Day or part thereof which shall elapse between the Delivery Due Date and the actual date of delivery;

- 14.2** The Client shall deduct the amount of such damages from any moneys due or to be due to the Supplier up to a maximum of fifteen percent (15%) of the total sum payable under the GPO/LOC;
- 14.3** The payment or deduction of such damages shall not relieve the Supplier from its obligation to deliver the Supplies, or from any other obligations and liabilities under this Agreement;
- 14.4** Any delay notice given by a Party shall be in writing and not backdated and shall be delivered by hand. The affected Party shall issue the delay notice to the other Party within a reasonable time before the Delivery Due Date;
- 14.5** The delayed Party may request for an Extended Delivery Due Date, provided the total Extended Delivery Due Date shall not be in excess of **5 Days of the Delivery Due Date**. The Client may cancel any GPO/LOC where the Supplier fails to deliver by the Delivery Due Date including any Extended Delivery Due Date agreed to in writing;
- 14.6** It shall be the responsibility of both Parties to take all reasonable precautions to minimise the effects of any delays.

## **15. REFERRAL OF ALLEGATIONS TO THE PUBLIC PROCUREMENT REGULATORY AUTHORITY**

### **Code of Conduct for Contractors**

- a) The Supplier is subject to the Code of Conduct for Contractors in Schedule 3 of the Public Procurement Act;
- b) The Client reserves the right, in terms of **section 162 (1) of the Public Procurement Act**, to submit an allegation on any conduct of the Supplier, which contravenes the Code of Conduct or the terms of this Agreement to the PPRA, within 14 days of becoming aware of such contravention by the Supplier

## **16. TERMINATION**

- 16.1** Unless terminated pursuant to its terms, this Agreement shall terminate automatically upon fulfilment of each parties' obligations hereof;
- 16.2** The Client may terminate this Agreement at any time prior to issuance of a LoC/GPO, by giving the Supplier five (5) Days written notice;
- 16.3** The Supplier may terminate this Agreement at any time, if, after giving the Client five (5) Days written notice of a material breach of the Agreement, the Client does not rectify such material breach within the said five (5) Days of receipt of the notice or such other period as may be agreed;

**16.4** Additionally, the Supplier may terminate this Agreement at any time by giving the Client five (5) Days written notice in the event the Supplier reasonably determines that it is unable to render its obligations, as a result of the Client's inaction or delay in taking the necessary steps or actions to enable the Supplier to execute its obligations including, without limitation, the Client's inaction or delay in discharging its obligations;

**16.5** In such case, the Supplier's notice shall describe the remedial actions required to be taken by the Client and the Agreement shall automatically lapse at the expiry of the five (5) Days period unless, in the Supplier's opinion, the Client has taken sufficient remedial action by that date;

**16.6** In the event of such termination all unbilled, accrued and unpaid fees and expenses payable to the Supplier shall immediately become due and payable;

**16.7** Notwithstanding the provisions of this Agreement the Client shall be entitled to immediately terminate this Agreement upon the occurrence of any of the following events:

- a)** the Supplier ceases to carry on business;
- b)** a resolution is passed for the liquidation of the Supplier;
- c)** the Supplier is placed under provisional or final liquidation;
- d)** a judicial manager is appointed to manage the affairs of the Supplier;
- e)** the Supplier enters into an arrangement or composition of its debts (including any voluntary arrangement as defined by the Insolvency Act of Botswana, (Cap 42:02); or
- f)** the Supplier commits an act of insolvency.

**16.8** Termination of this Agreement shall not prejudice any rights of either Party, which had arisen on or before the date of termination.

## **17. TERMINATION FOR DEFAULT**

**17.1** If the Supplier fails to deliver any or all Services or, Supplies or work required to be delivered under this Agreement within the time period(s) specified in this Agreement, the Supplies do not conform, in all respects, to the Product Specifications set out in this Agreement, then the Client shall give the Supplier written notice describing the default and requesting that the default be rectified within five (5) Days.

**17.2** If the Supplier does not remedy the default to the satisfaction of the Client within the five (5) Day period specified, the Client may serve notice in writing upon the Supplier terminating this Agreement with immediate effect;

**17.3** Notwithstanding any other provision in this Agreement, if the Client is required due to this default, to re-tender for or to reprocur all or part of the Services, Supplies or work from others similar to that terminated, then the Supplier shall be liable to the Client for costs in excess of the Unit Price per Product;

**17.4** Any claim for damages arising out of default and termination shall be agreed between the Client and the Supplier, failing agreement, shall be referred to a court of competent jurisdiction in the Republic of Botswana.

## **18. REMUNERATION**

The remuneration of the Supplier charged to the Client shall constitute its only remuneration in connection with this Agreement and neither it nor its Personnel shall accept any trade commission, discount, allowance or indirect payment or other consideration in connection with or in relation to this Agreement, or to the discharge of its obligations hereunder.

## **19. FORCE MAJEURE**

19.1 Neither Party shall be liable for failure to perform under this Agreement if such failure is as a result of *Force Majeure*. For the purposes of this Agreement, "*Force Majeure*" means an event which is beyond the reasonable control of a Party and which event makes a Party's performance under this Agreement impossible or so impractical as reasonably to be considered impossible under the circumstances.

19.2 *Force Majeure* shall not include:

- a) any event which is caused by the negligence or intentional action of the Party claiming *Force Majeure* or such Party's agents or employees; nor
- b) any event which a diligent Party could reasonably have been expected to:
  - i. take into account at the time of the execution of this Agreement; and
  - ii. avoid or overcome in the carrying out of its obligations hereunder.
- c) During the period of such *Force Majeure*, the provisions of this Agreement shall be suspended and neither Party shall have any claim against the other by virtue of such *Force Majeure*;
- d) The time schedules for the performance of the Services interrupted by such suspension shall be revised by mutual agreement when those Services are resumed;
- e) Where both Parties agree that *Force Majeure* exists, either Party may terminate this Agreement if such *Force Majeure* extends for more than ten (10) Days. Notice of not less than five (5) Days of its intention to terminate this Agreement or part thereof shall be given by the terminating Party to the other Party;
- f) In the event of such termination, the Supplier shall be paid for any Supplies delivered, up to the date of notification.

## **20. CONFIDENTIALITY**

20.1 The Supplier shall keep the contents of the Agreement entirely confidential and not use, publish, or make known, without the Client's prior written approval, any information developed by the Supplier in accordance with this Agreement or, by the Client, to any persons other than personnel of the Parties to this Agreement. However, the foregoing obligations shall not apply to any information that was in the Supplier's possession prior to commencement of work and Services under this Agreement, or which is

trivial or obvious or which is or shall be made available to the general public, otherwise than by the Supplier, and provided further that this obligation shall in no way limit the Supplier's internal use of such work;

- 20.2** Any public presentation regarding the Client shall be made by the Client and any request made to the Supplier for information by the news media, or others, shall be referred to the Client. Additionally, the Supplier shall not reference the Client nor the work or Services performed for the Client without prior written approval;
- 20.3** Any information the Supplier considers as proprietary or confidential and which it has indicated or marked as proprietary or confidential shall be treated by the Client in the same manner as the Client treats its own proprietary or confidential information.

## **21. ASSIGNMENT**

- a. Neither this Agreement nor any duty or right under it shall be delegated or assigned by the Supplier without the prior written consent of the Client;
- b. In the event that the Supplier does assign any monies due or to become due to it hereunder, the Supplier shall provide the Client with two (2) copies of each and every assignment, including electronic copies, and the media for such shall be agreed between the Parties;
- c. The Supplier also agrees, notwithstanding the terms of any such assignment, that the Client may subject any payments to an assignee to set-off or recoupment for any present or future claim or claims which the Client may have against the Supplier;
- d. The Client reserves the right to make direct settlements or adjustments, or both, with the Supplier under the terms of this Agreement and without notice to the assignee;
- e. The Supplier shall indemnify and hold harmless the Client against any liability that may arise as a result of such assignment.

## **22. INDEMNIFICATION**

- 22.1** The Supplier agrees to indemnify and hold harmless the Client, its officers, employees and agents against all claims, suits and losses, including reasonable attorney's fees, that are due to personal injury (including death) or property damage to the extent caused, or alleged by a claimant to have been caused, in connection with the performance of work and Services under this Agreement, from:
- a)** improper or defective Supplies supplied by the Supplier;
  - b)** improper or defective machinery, materials, Supplies, implements, equipment or appliances provided, delivered, installed or used by the Supplier, or
  - c)** negligent or wrongful acts or omissions of the Supplier.
- 22.2 The Supplier agrees to indemnify and hold harmless the Client, its officers, employees and agents against all claims, suits and losses, including reasonable attorneys' fees that may arise from patent, trademark or copyright infringement, or the infringement of any other related intellectual property right, by the Supplier;
- 22.3 The Supplier further agrees to indemnify and hold harmless the Client in any action brought against the Client by the Supplier's employees seeking further compensation for claims covered or that should have been covered by the Supplier's worker's compensation scheme;
- 22.4 The obligations set out in this Clause shall survive the completion, expiration or termination of this Agreement.

## 23. LIABILITY OF THE SUPPLIER

- 23.1** In no event shall the Supplier be liable for unforeseeable, indirect, incidental or special damages, including, but without limitation to, any loss of revenues or loss of profits, arising either directly or indirectly as a result of the performance of this Agreement, or as a result of any act or omission by the Client, in respect of the obligations of the Client in terms of this Agreement, including, but not limited to a failure by the Client to provide the Supplier access to any information, system or facility in terms of **Clause 28**.
- 23.2** The Supplier shall be liable for the consequences of errors and omissions arising from negligence or wilful misconduct on its part or on the part of its employees or agents. The Supplier shall at its own cost be solely responsible for remedying any such errors and omissions.
- 23.3** The Supplier does not exclude or limit its liability for:
- a) death or personal injury caused by its negligence or that of its Personnel or Representative; and
  - b) fraud or fraudulent misrepresentation by it or its Personnel or Representative.
- 23.4** The liability of the Supplier in respect of any claim by the Client, except as provided in **Clause 23.1**, shall be limited, for all claims combined, to the total amount of fees payable by the Client to the Supplier under this Agreement or One Million Pula (BWP 1 000 000.00), whichever is greater.
- 23.5** The Supplier shall be liable for loss, damage, or injury caused to third parties by any default attributable to the Supplier or its employees or agents during the performance of the Services under this Agreement, and it shall take out and maintain adequate insurance in respect thereof, as further provided for in **Clause 24**.
- 23.6** The Supplier shall be liable for any violation of legal provisions or rights of third parties in respect of intellectual property rights in documents prepared by it.

## 24. INSURANCE

- 24.1** The Supplier shall effect and maintain policies of insurance to provide a level of cover sufficient for all risks which may be incurred by the Supplier under this Agreement including death or personal injury, or loss of or damage to property;
- 24.2** The terms of any insurance policies or the amount of cover shall not relieve the Supplier of any liabilities arising under this Agreement;
- 24.3** The Supplier shall within a period of 10 Days of THE Commencement Date of this Agreement, produce to the Client, copies of all insurance policies referred to in this Clause or a broker's verification of insurance to demonstrate that the appropriate cover is in place, together with receipts or other evidence of payment of the latest premiums due under those policies;

24.4 If, for whatever reason, the Supplier fails to give effect to and maintain the insurances required by this Agreement then the Client may make alternative arrangements to protect its interests and may recover the costs of such arrangements from the Supplier.

**25. SUB-CONTRACTS**

The Supplier shall not subcontract any of its obligations in this Agreement.

**26. ALTERATION**

No alteration, variation, cancellation, addition or amendment to, or deletion in this Agreement, including this Clause, shall be of any force or effect, unless put in writing and signed by both Parties.

**27. WAIVER**

No failure, delay, relaxation or indulgence on the part of either Party in exercising any power or right conferred upon such Party in terms of this Agreement, shall operate as a waiver of such power or right, nor shall any single or partial exercise of any such power or right preclude any other or further exercise thereof, or the exercise of any other power or right under this Agreement.

**28. ACCESS TO INFORMATION**

**28.1** The Client shall grant the Supplier access to all relevant information, systems and facilities reasonably required by the Supplier to perform its obligations;

**28.2** The Supplier shall ensure that access to such information is allowed only to its personnel, for use exclusively in executing the obligations of the Supplier in this Agreement.

**29. SETTLEMENT OF DISPUTES'**

**29.1 Amicable Settlement**

The Parties shall use their best efforts to settle amicably all disputes arising out of, or in connection, with the application or interpretation of this Agreement.

**29.2 Procedure for the amicable settlement of dispute**

a) The amicable settlement of disputes shall take place as follows:

- i. either Party shall notify the other Party of the dispute in writing, and propose recourse to an amicable settlement;
- ii. the deadline for invoking amicable settlement procedures shall be ten (10) Days following the notification referred to in **Clause 29.2 (a)(i)**. The maximum time limit for reaching an amicable settlement shall be ten (10) Days following the notification referred to in **Clause 29.2 a)(i)** above;



iii. the time limit for responding in writing to a request or other requests allowed during the course of the proceedings shall be five (5) days from receipt of such requests. Where this time limit is not satisfied, the Party that made the request shall deliver a reminder. If no response has been received within eight (8) days of the receipt of the reminder, the attempt to make an amicable settlement shall be deemed to have failed.

b) No dispute may be submitted to a court for determination, unless all administrative remedies have been exhausted. Such remedies shall be deemed to have been exhausted if no final decision shall have been reached by the Parties within the ten (10) Day period set out in **Clause 29.2 (a) (ii)** above.

29.3 In the event that the Parties have failed to resolve the dispute amicably, the dispute may be referred to a court of competent jurisdiction in the Republic of Botswana for determination.

### **30. DOMICILIUM CITANDI ET EXECUTANDI**

The Parties choose as their *domicilium citandi et executandi* their respective addresses below for all purposes arising out of or in connection with this Agreement, and at which addresses all the processes and notices arising out of or in connection with this Agreement, its breach or termination, may validly be served upon or delivered to the Parties.

**FOR THE CLIENT:**

The Director  
Central Medical Stores  
Plot 22103/4/5/6/7  
Kgomokasitwa Street  
Gaborone West Industrial  
P. O. Box 639  
Gaborone, Botswana  
**Tel:** 3982702  
**Fax:** 3904549

**Email:** [cmsdirector@gov.bw](mailto:cmsdirector@gov.bw) copied to  
[cmscontracts@gov.bw](mailto:cmscontracts@gov.bw)

**FOR THE SUPPLIER:**

(insert the supplier's physical, postal and email addresses)

### **31. SERVICE OF NOTICES**

**31.1** The Parties shall accept service of all documents, notices and processes in terms hereof at their *domicilium citandi et executandi* stipulated in **Clause 30** of this Agreement;

**31.2** Any notice or communication sent by either Party to the other shall be deemed to be received on the seven (7) Days after the date of posting by registered post or on the date of delivery in the case of delivery by hand, or where such notice is transmitted by way of facsimile on the record date of the transmission of such facsimile provided such facsimile must be promptly confirmed by letter sent by mail.

**31.3** Either Party shall be entitled to change the address specified by it in terms of this Agreement to any other address (not being a post office box or *post restante*) on not less than seven (7) Days prior written notice to the other Party.

**31.4** It is specifically agreed that email communication shall not be used.

## **32. SEVERABILITY**

If any one or more of the provisions of this Agreement shall for any reason be held to be invalid, illegal, or unenforceable, the same shall not affect the remainder of this Agreement, which shall remain of full force and effect.

## **33. ENTIRE AGREEMENT**

**33.1** This Agreement, including all Appendices, annexes or schedules, and other documents attached hereto and referred to herein, constitute the entire, integrated understanding and agreement between the Parties and supersedes any oral or prior written agreement with respect to the subject matter of this Agreement;

**33.2** No representations, terms, conditions or warranties in respect of the matters dealt with in this Agreement not contained in this Agreement shall be binding on the Parties;

**33.3** The headings and numbers used in this Agreement and its Appendices, annexes or schedules, are for convenience only and shall not be construed or interpreted as having a bearing on the contents, or context or meaning, of its provisions;

**33.4** All of the terms and provisions of this Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Parties hereto.

**33.5** Appendix B (General Specifications), attached hereto shall be deemed to form, and be read and construed as an integral part of this Agreement.

## **37. COSTS**

Each of the Parties shall be responsible for its own legal costs of and incidental to the negotiation, preparation, settling, signing and implementation of this Agreement.

## EXECUTION

The duly authorised representatives of the Client and the Supplier whose signatures appear below execute this Agreement.

**THUS DONE AND EXECUTED IN .....**

this .....day of.....20....

**FOR AND ON BEHALF OF THE MINISTRY OF HEALTH**

.....  
NAME

.....  
SIGNATURE

being authorised in this capacity as.....

Witnesses: 1.....  
SIGNATURE

Name .....

2.....  
SIGNATURE

Name.....

**THUS DONE AND EXECUTED IN .....**

this.....day of.....20....

**FOR AND ON BEHALF OF (*insert name of supplier*)**

.....  
NAME

.....  
SIGNATURE

being authorised in this capacity as.....

Witnesses: 1.....  
SIGNATURE

Name.....

2.....  
SIGNATURE

Name.....

## **APPENDIX A**

### **SUPPLIER'S PRICE SCHEDULE**

# **APPENDIX B**

## **General Specifications**